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Nos. 85-2133 and 86-134

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

CROUNSE CORPORATION, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

PATRICK W. SIMMONS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission properly authorized the acquisition by a railroad of a water carrier under the Panama Canal Act of 1912, as codified in 49 U.S.C. 11321.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 781 F.2d 1176. The decision of the Interstate Commerce Commission (Pet. App. 47a-210a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1986 (Pet. App. 42a). A petition for rehearing was denied on March 28, 1986 (Pet. App. 43a). The petition for a writ of certiorari in No. 85-2133 was filed on June 26, 1986 and the cross-petition in No. 86-134 was filed on July 28, 1986.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 49 U.S.C. 11321 (a codification of former Section 5(15)-(17) of the Interstate Commerce Act (49 U.S.C. (1976 ed.)) and Section 11 of the Panama Canal Act (ch. 390, 37 Stat. 566)), a railroad may not acquire a competing water carrier unless the Interstate Commerce Commission (ICC) has authorized the transaction. The Commission may authorize such an acquisition if it finds that the transaction "will still allow that water common carrier * * * to be operated in the public interest advantageously to interstate commerce and * * * still allow competition, without reduction, on the water route in question" (49 U.S.C. 11321).

The present case arose when CSX Corporation (which owns several railroads) sought to acquire control of American Commercial Lines, Inc. (ACL) and its subsidiary, American Commercial Barge Lines, Inc., a water carrier (ACBL). In November 1983, CSX and ACL jointly filed an application (Pet. App. 51a) seeking Commission authorization of the ac-

[1] We will refer to petitioners in No. 85-2133 as "petitioners," and to the petitioner in No. 86-134 as "cross-petitioner" or "Simmons."

quisition under 49 U.S.C. (& Supp. II) 11321 and 11344.[2] The Companies asserted that the transaction would result in substantial public benefits (*e.g.*, reduced costs and other advantages of integrated operations), that it would allow intermodal services to be priced more efficiently, and that it would expand shippers' options, thereby generally enhancing the competitiveness of the market (Pet. App. 63a-64a).

After extensive public hearings, the Commission approved the application. The Commission concluded that the Act did not mandate total separation of rail and barge lines. Rather, the Commission ruled, the plain language of the statute and its legislative history confirmed "that Congress intended that these statutory limitations should be used only to prohibit those rail-water combinations which could be expected to have an adverse effect on competition" (Pet. App. 70a). In particular, the Commission concluded that it was not required to deny any application merely because an acquisition might have an adverse impact on one or more competing barge lines, so long as it could not find that the overall level of competition would not be reduced (*id.* at 80a-81a, 187a-188a).[3] "Harm to competitors does not imply harm to competition." *Id.* at 80a.

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[2] Section 11344 requires Commission approval whenever any carrier subject to the Commission's jurisdiction is acquired by another carrier subject to the Commission's jurisdiction.

[3] The Commission said it would no longer follow that part of its decision in *Illinois Cent. R.R.—Control—John I. Hay Co.* (*John Hay*), 317 I.C.C. 39 (1962), that might be read to prohibit an acquisition that adversely affects particular competitors without reducing competition (Pet. App. 80a-81a). The Commission stated that the now-rejected portion

Following the analysis in the Department of Justice Merger Guidelines, the Commission concluded that competition between rail transportation and water carriage is limited because rates and costs are significantly lower for barges than for railroads. For that reason, the Commission focused on water carrier transportation as the relevant product market, considering other modes of transportation when an impact on water rates was shown (Pet. App. 88a-89a). See *id.* at 127a-143a (effect of rail transportation on carriage of coal and agricultural commodities).

The Commission examined whether the proposed transaction would have the foreseeable effect of reducing competition in the barge industry. It first rejected the contention that the common ownership of CSX and ACBL would itself increase concentration to an anticompetitive level (Pet. App. 101a-102a). The barge market consists of hundreds of firms offering line-haul service in the relevant geographic market;[4] those firms can move easily from one part of the system to another and can move into the transportation of different commodities as opportunities for profit appear (*ibid.*). Next, the Commission re-

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of *John Hay* would effectively nullify the Commission's express power, under Section 11321(b), to approve rail acquisitions of water carriers (Pet. App. 80a-81a, 187a-188a).

[4] The Commission defined "the water route in question" as the Mississippi River System and the Gulf Intercoastal Waterway (Pet. App. 90a). Equipment is generally interchangeable throughout these areas and there is no physical barrier to movement throughout these inland waterway systems (*id.* at 195a-198a). Based on the extensive record before it (see *id.* at 94a-101a), the Commission found that the barge industry in the relevant geographic market was "highly competitive" and "not concentrated" (*id.* at 101a).

jected the contention that the transaction would enable CSX to engage in tactics that could allow it to raise its prices above competitive levels. The Commission found that several factors, including the shipper's ability to control the routing of traffic, the lack of economies of scale, and the ease of entry into the barge industry, were sufficient to prevent the post-transaction CSX from diverting from independent barge operators an amount of traffic that would harm competition (Pet. App. 103a-105a).

The Commission also found that the competitive nature of the barge industry would prevent CSX and ACBL from successfully undertaking a strategy of predatory pricing in an effort to drive out competition and achieve a monopoly (Pet. App. 106a). It found that the most significant deterrent to any attempt by CSX-ACBL to dominate the barge industry, or otherwise profit from predatory practices, is the ease of entry into the market, permitting new carriers to enter or re-enter and offer lower rates (*id.* at 107a-114a). It reviewed a substantial body of data indicating that a new entrant of relatively modest size could successfully compete for line-haul business in the geographic market (*id.* at 111a-112a). Thus, natural market forces would "effectively constrain[]" CSX "from successfully engaging in any activity that would reduce competition" (*id.* at 115a).[5] Moreover,

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[5] The Commission also specifically analyzed the effect of the transaction on competition in barge transportation of coal and agricultural commodities (Pet. App. 127-143a) and found that no adverse effect on competition in those markets would result (*id.* at 134a, 137a-140a, 143a).

Finally, the Commission acknowledged that its conclusion that the CSX-ACBL combination will not result in a reduction in competition was predictive in nature and decided to impose

because the applicants had demonstrated that ACBL would continue as an active competitor, the Commission found the transaction also satisfied the remaining requirement of Section 11321(b), that the acquisition "will still allow [that] water common carrier * * * 'to be operated in the public interest advantageously to interstate commerce'" (Pet. App. 120a-121a).[6]

3. The court of appeals affirmed (Pet. App. 1a-41a). The court, adopting the Commission's view, found that the Panama Canal Act was not "a strict prohibition against railroad ownership of bargelines

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extensive oversight and reporting conditions to permit it to monitor the approved transaction for anticompetitive consequences and take remedial action if warranted (Pet. App. 145a-147a, 208a-210a). On August 25, 1986, the Commission entered a decision in the oversight proceeding, in which it concluded that the record "fails to show that the consolidation has reduced competition on ACBL's water routes or elsewhere", and that "the record shows that the consolidation has increased beneficial competition by allowing CSX and ACL to introduce new intermodal price and service options." Finance Dkt. No. 30300 (Aug. 25, 1986), slip op. 2.

[6] The Commission also concluded (Pet. App. 122a-127a) that approval was appropriate under Section 11344(d), which provides, in pertinent part, that "the Commission shall approve * * * an application unless it finds that—(1) as a result of the transaction, there is likely to be substantial lessening of competition * * *." Section 11344(d) was added by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 228(b), 94 Stat. 1931, and provides a less stringent standard of approval for consolidations that do not involve two class I rail carriers. See H.R. Conf. Rep. 1430, 96th Cong., 2d Sess. 120 (1980); Pet. App. 81a-82a (discussing the appropriate factors for consideration when Section 11344(d) governs).

In addition, the Commission imposed statutorily-required labor protective conditions for the benefit of CSX railroad employees (Pet. App. 53a). Consistent with recent precedents, the Commission refused to extend this protection to include employees of other railroads (*id.* at 149a-150a).

* * * [but a statute] meant to remedy a particular evil which frequently accompanied railroad acquisition of bargelines" (*id.* at 6a-7a), *i.e.*, reduction of rates to eliminate barge competition and subsequent raising of rates after water competition has been eliminated (*id.* at 7a-11a). The Court also found that the Commission had correctly construed the Act "to require an actual reduction in competition as opposed to simply harm to particular bargelines due to intensified competition" (*id.* at 14a).

In assessing the Commission's application of the Act, the court deferred to the Commission's factual findings and declined to reweigh the evidence. Since substantial evidence supported the Commission's definitions of the relevant product and geographic markets (Pet. App. 16a-17a) and its findings that predatory pricing would not succeed where there is well-financed competition in an industry with low barriers to entry (*id.* at 20a-21a), the court accepted the Commission's conclusion that water carrier competition would not be reduced by the merger (*id.* at 21a).

The court of appeals also affirmed the Commission's conclusion that protective conditions were not required for the benefit of non-CSX rail employees (Pet. App. 25a-26a). See note 6, *supra.*

Judge Timbers dissented. In his view, the direct competition between CSX and ACL (Pet. App. 34a-35a) should have triggered a different analysis and result under the Panama Canal Act.

ARGUMENT

The court of appeals correctly affirmed the interpretation of the Act by the agency charged with administering it and correctly concluded that the agency's findings were supported by substantial evidence.

These conclusions do not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 12-17) that the Act was "designed to prohibit * * * common ownership" of rail and water carriers (*id.* at 13). The court of appeals correctly and unanimously rejected that interpretation (Pet. App. 6a-10a, 33a), finding that "Congress intended only to end the specific anti-competitive practice which prompted it to act. Congress declined to go further and enact the strict prohibition * * * petitioners now ask us to read into the Act" (*id.* at 9a).

As the court of appeals noted, this conclusion was supported by the legislative history of the Panama Canal Act (Pet. App. 7a-8a); the statutory language (*id.* at 8a-9a); early Commission decisions (*id.* at 9a-10a); and the reenactment of the statute in the Transportation Act of 1940 ("[T]he debates reveal some sentiment for * * * rail-barge separation * * * but that sentiment did not find its way into the statute as []enacted" (Pet. App. 10a)).[7] In addition,

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[7] Petitioners' argument (Pet. 21-23) that the 1940 legislation undercuts the ICC's interpretation is incorrect. The Transportation Act of 1940 amended the Panama Canal Act by giving the Commission specific authority to authorize "acquisitions" of water carriers. See former Section 5(17); *Water Transport Ass'n* v. *ICC*, 715 F.2d 581, 590 (D.C. Cir. 1983), cert. denied, 465 U.S. 1006 (1984) (*WTA*). This was done, according to the Conference Report, to "make[] more certain the authority of the Commission, in connection with which there ha[d] apparently been [some] doubt, with respect to the installation of new service." H.R. Conf. Rep. 2832, 76th Cong., 3d Sess. 69 (1940). See *WTA*, 715 F.2d at 589 n.20; Pet. App. 10a (emphasis in original) ("a change [of] wording intended to clarify that the [exemption would]

the court commented (*ibid.*) that its ruling was in accord with the decision of "the only court to consider the question since the 1940 reenactment" (see *Water Transport Ass'n* v. *ICC*, 715 F.2d 581, 590

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be applied not only to applications for *continuing* joint operation, but also to application[s] for *new* joint operation[]"). Thus, the 1940 legislation was intended to make it clear that the Commission did have power to authorize rail-barge combinations, the antithesis of petitioners' contention.

Petitioners also err in attributing to the Commission (Pet. 22) the longstanding view that the Act "prohibited railroads from owning water carriers in competition with rail routes." That had never been the Commission's interpretation of the Act.

The court of appeals traced Commission decisions back to 1915 (Pet. App. 9a-10a). It noted that in *Lake Line Applications Under Panama Canal Act*, 33 I.C.C. 700 (1915), the Commission relied on public interest grounds to deny continued rail-water ownership rather than on "a perceived strict mandate of rail-barge separation" (Pet. App. 9a). Indeed, in *Ocean Steamship Co.*, 37 I.C.C. 422 (1915), the Commission permitted a railroad to continue its ownership of a steamship line with which it competed (see Pet. App. 9a-10a). See *Southern Pacific Company's Ownership of Atlantic Steamship Lines*, 77 I.C.C. 124 (1923) (Commission approved railroad's ownership of a new competing water service); *Investigation of Seatrain Lines, Inc.*, 206 I.C.C. 328 (1935) (approving two railroads' ownership of a new water carrier that competed with the railroads).

In *WTA*, which also arose out of the CSX-ACL transaction (see note 8, *infra*), the District of Columbia Circuit also reviewed the history of the ICC's interpretation of the Act and rejected petitioners' wooden view that the statute requires absolute separation of rail and barge ownership (*WTA*, 715 F.2d at 588). As the court concluded in *WTA* (*ibid.*), petitioners' interpretation is erroneous in light of Congress's endorsement of the Commission's position, and expansion of Commission authority, in the 1940 legislation.

(D.C. Cir. 1983), cert. denied, 465 U.S. 1006 (1984).[8] Had Congress intended to create an absolute bar to rail acquisition of barge lines it knew how to do so; it certainly would not have created a mechanism for Commission approval if all such transactions were prohibited (see Pet. App. 11a).

The court of appeals also correctly rejected petitioner's contention (Pet. 12-16) that the Commission was required to disapprove the transaction if there would be *any* reduction of rail-barge competition (as distinct from barge-barge competition). Petitioners argued that since the merger would obviously eliminate competition between CSX and ACBL, there would necessarily be a "reduction in competition under the Act," precluding Commission approval (Pet. App. 11a). But, as the court of appeals recognized, the Act refers only to reductions in competition "on the water route in question," and a reduction in rail-barge competition is relevant only insofar as it affects competition on the water route. As the court discerned, petitioners' contention is just another way of stating their erroneous position that the Act bars all mergers between competing rail and barge lines. The Act requires Commission approval only of mergers between *competing* rail and barge lines, and provides for such approval if there is no reduction of competition on the water route. Petitioners' theory would preclude approval of any merger of formerly competing rail and barge lines and would thus read

[8] *WTA* arose from the same transaction that is at issue here. When the acquisition was first proposed, CSX and ACL sought to place the stock of ACBL in an independent voting trust pending Commission approval of the acquisition. The District of Columbia Circuit upheld the Commission's determination that the voting trust arrangement was permissible.

the approval mechanism out of the statute (Section 11321(b)). See *Texas Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) ("the act cannot be held to destroy itself").[9]

There is no merit to petitioners' converse contention that the Commission and the court erroneously disregarded rail-barge competition altogether. As the court recognized, the Commission considered rail-barge competition "to the extent that [such competition] effectively disciplined barge rates on the routes in question" (Pet. App. 16a, 87a-88a). Competition from rail transportation was specifically discussed in assessing the effects of the proposed transaction on separate commodity markets, such as coal (*id.* at 127a-134a) and agricultural commodities (*id.* at 134a-143a). The court correctly held (Pet. App. 21a) that in light of the Commission's finding, supported by substantial evidence, that rail-barge competition in the relevant area was limited (*id.* at 88a), the consideration given to such competition was ample to satisfy the statutory standard.[10]

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[9] Similarly, there is no merit to petitioners' contention (Pet. 24) that the decision below would permit the Commission to approve any merger so long as barge competition was not totally eliminated. Neither the court nor the Commission adopted the "destruction" of competition standard petitioners envision. Rather, as the court stated (Pet. App. 14a): "In the instant case, the Commission construed the Act to require an actual reduction in competition as opposed to simply harm to particular bargelines due to intensified competition."

[10] While petitioners challenge language in the court's opinion that, they contend, would eliminate any examination of rail-barge competition, it is clear that the court did not dispense with such competitive analysis. Moreover, the Commission expressly addressed rail-barge competition when, on the facts in this case, such an inquiry was warranted. As

2. Petitioners' other principal argument is that this particular transaction should not have been approved. That is essentially a fact-based contention, and there is no reason for this Court to reweigh the evidence underlying the factual findings on which the Commission and the court below concurred.

The essence of this contention appears to be that the Commission and the court paid too little attention to effects on particular barge competitors. But the court understood Congress's purpose: to be sure that shippers would continue to have a "genuine [barge] alternative to rail [service]" (Pet. App. 7a). The Act's concern, and the Commission's, was to preserve competition—not, as petitioners were demanding, to preserve the position of every existing barge line. The court correctly concurred (*id.* at 19a): "[H]arm to competitors [need not] translate into harm to competition * * *. That some competitors may suffer a reduction in traffic does not mean that the competition which benefits shippers will be diminished to any degree."

3. Petitioners' final contention (Pet. 23) is that approval of the CSX-ACL acquisition "effectively repealed" the Act. But, as the court of appeals recognized, the Commission did nothing of the sort: "[t]he Act remains in full force and the Commission, of course, will continue to analyze acquisitions under the Act on a case-by-case basis" (Pet. App. 11a). Should an acquisition be proposed where the likely

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a result, even if petitioners' objection to the language in the opinion below were well-founded it would not alter the judgment. And, to the extent that petitioners contend that greater emphasis should have been given to rail-barge competition, that is a factual question—within the Commission's area of expertise—that does not warrant this Court's consideration.

effect is reduction of competition on the water route, the Commission retains its full statutory power to act.

As the Commission and the court recognized, the economics of the transportation industry are far different today from what they were in 1912. This Court has indicated that the Commission is to exercise "flexibility and adaptability to changing needs and patterns of transportation." *American Trucking Associations* v. *Atchison T. & S.F. Ry.*, 387 U.S. 397, 416 (1967). Rail-barge mergers that might have reduced competition on the water route 70 years ago will not necessarily create anticompetitive results today. The Commission's decision in this case discharged its statutory duty in a way that responsibly accommodates federal authority to present economic conditions.[11]

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[11] The questions presented in the cross-petition are insubstantial. We note first that, contrary to cross-petitioner's assertion (Cross-Pet. 6), Rule 20.5 of the Rules of the Supreme Court precludes consideration of the cross-petition if the petition in No. 85-2133 is denied. With respect to the merits of the cross-petition, Simmons appears to be contending that the Commission is not foreclosed from considering the interest of non-CSX employees. But the court of appeals did not rule that such employees "cannot be considered" (Cross-Pet. 10). It ruled on, and rejected, cross-petitioner's argument, based on *Detroit, Toledo & Ironton R.R.* v. *United States*, 725 F.2d 47 (6th Cir. 1984), that Section 11344(b)(1)(D) applied and, accordingly, that the Commission was *required* to consider the interests of employees of nonparticipating railroads (Pet. App. 24a-25a). Since Simmons now concedes that Section 11344(b)(1)(D) does not apply (Cross-Pet. 11-12), there is no intracircuit conflict within the Sixth Circuit. Even if such a conflict existed, it would be a matter for the court of appeals to resolve. Cross-petitioner's second contention (*id.* at 12-14)—based on a hypothetical case involving two class I rail carriers—is even less deserving of review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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